

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Frontier Communications of America, Inc.	)	WC Docket No. 06-6
Petition for Preemption of Tennessee Code	)	
Annotated § 65-29-102 and the Tennessee	)	
Regulatory Authority's Decision That This	)	
Statute Restricts Frontier's Statewide	)	
Certificate of Convenience to Operate as a	)	
CLEC	)	

**Comments of Ben Lomand Rural Telephone Cooperative, Inc.**

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Date: February 21, 2006

Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand"), by and through its undersigned counsel, hereby files initial comments in opposition of the Petition for Preemption ("Petition") filed by Frontier Communications of America, Inc. ("Frontier") on December 14, 2005 in the above-captioned proceeding.

- I. Frontier's Petition is premature because the Tennessee Regulatory Authority did not deny Frontier's Petition based on the provisions of T.C.A. § 65-29-102.

The Tennessee Regulatory Authority ("TRA") did not deny Frontier's Petition based on T.C.A. § 65-29-102.<sup>1</sup> The motion adopted by the TRA (no written order has been issued at the date of these Comments) states:

... Frontier, then known as Citizens Communication, when requesting authority to provide competing telephone service was not granted statewide approval to provide a competing service. The 1996 order did not extend Citizens' authority statewide to enter into territories of ... cooperatives, and it was clearly not my intent nor was it supported in the record.

I believe it is appropriate to dismiss the petition of Frontier at this time as it simply asks for relief that cannot be granted given its current certificate of convenience and necessity.

Transcript, November 7, 2005, p. 3 (copy attached as Exhibit "A").

In voting for such motion, Director Deborah Tate stated, " ... At least two other companies have come before us to expand their CCNs to enable it to extend service into previously restricted areas. So I'm not in any way prejudging that issue and whether or not it might come before us in the future in that -- that there are other appropriate procedural avenues other than the ones that are before us today." Transcript, p. 4.

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<sup>1</sup> Tennessee Code Annotated § 65-29-102 is the statute which Frontier is requesting the Federal Communications Commission to preempt. Such statute states, "Cooperative, non-profit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service; provided that there shall be no duplication of service where reasonably adequate telephone service is available."

In other words, the certificate of convenience and necessity (“CCN”) that Frontier obtained from the TRA in 1996 does not give it statewide authority. The TRA, as shown above, stated that Frontier should file a petition with the TRA asking to expand its CCN for statewide authority instead of the declaratory ruling petition which was denied. Frontier has not done this and, instead, acted prematurely by petitioning the FCC to preempt a statute which was not the basis of the denial of its petition at the TRA. Even if the FCC could legally preempt the TRA’s application of T.C.A. § 65-29-102, there is no basis for the drastic step of preempting the law itself. Section 253(a) of the Telecommunications Act of 1996 (“1996 Act”) grants the FCC the authority to preempt any state actions that directly prohibit, or have the effect of prohibiting, competitive entry into a telecommunications market. However, Subsection 253(d) contains an admonition to the FCC to preempt only “to the extent necessary to correct such violation or inconsistency” with Section 253(a) or (b). In the case *sub judice*, the FCC does not need to preempt T.C.A. § 65-29-102 because such statute was not the basis for the denial of Frontier’s declaratory ruling petition at the TRA. For the FCC to preempt a statute not the basis of the TRA’s decision would violate the provisions of Section 253, as no state statute has been used to deny Frontier’s declaratory ruling petition, and Subsection (d) requires limited and defined action by the FCC in its preemption authority.

The FCC should deny Frontier’s Petition and direct Frontier to reapply with the TRA to expand its CCN in Tennessee, as suggested by the TRA in its ruling.

II. There is no legal basis for the wholesale preemption of T.C.A. § 65-29-102.

Even though the TRA did not use T.C.A. § 65-29-102 as the basis of its denial of Frontier’s declaratory ruling petition, Ben Lomand will address such statute. This does

not waive in any manner the arguments set forth hereinabove that the FCC should deny Frontier's Petition because T.C.A. § 65-29-102 was not the basis for the denial of Frontier's petition at the TRA.

A. Frontier has not exhausted all remedies prior to petitioning the FCC.

T.C.A. § 65-29-102 is not a blanket denial of service by non-telephone cooperatives in the cooperative's service area. The statute provides, "There shall be no duplication of service where reasonably adequate telephone service is available." Such language requires a competitor to petition the TRA to determine if "reasonably adequate telephone service is available" and, if not, then such petitioner could be allowed to provide service in such service area. The statute in question is competitively neutral in that anyone can challenge the singular presence of a rural telephone co-op by showing that there is a lack of "reasonably adequate telephone service." The application of such statute is in a non-discriminatory manner since any telecommunications service provider can so challenge the existence of "reasonably adequate telephone service." This is a case-by-case, factual determination and the TRA should be given the opportunity to determine so in the event a telecommunications service provider so challenges a rural telephone cooperative. Frontier has not done so in this case. Since Frontier has not asked the TRA to expand its CCN nor has it made the effort to show that Ben Lomand is not providing "reasonably adequate telephone service," Frontier has not exhausted all of its available remedies prior to petitioning the FCC.

**B. T.C.A. § 65-29-102 is necessary to protect the public safety and welfare, insure the continued quality of telecommunications services**

**in rural areas, to safeguard the rights of consumers, and does so in a competitively-neutral and non-discriminatory manner.**

The purpose of T.C.A. § 65-29-102 is to provide telephone service in rural areas. Cooperative, non-profit, membership corporations such as Ben Lomand were permitted by the Tennessee General Assembly in order to provide telephone service in rural areas where it is difficult and costly to provide telephone service. In order to protect the public safety and welfare by providing such service, including 911, insure the continued quality of telecommunications services and safeguard the rights of consumers, the Tennessee General Assembly provided for the establishment of such rural cooperatives. The statute does not give them unlimited, exclusive territorial rights nor does it prohibit competition, since any potential competitor could challenge the cooperative on the grounds that such cooperative is not providing “reasonably adequate telephone service.”

T.C.A. § 65-29-102 allows telephone service in small areas with relatively few customers and where such small serving areas include a few large business customers whose revenue supports the provision of affordable service to the cooperative’s residential customers. Frontier’s business plan is to target the premium and large business customers that offer the greatest opportunity for profit. The drain of revenue from such customers would be to the detriment of the residential customers of Ben Lomand.

To add to this scenario, Frontier has petitioned the TRA (in a separate TRA docket) for permission to price services below the Tennessee statutory price floor and Frontier has been granted such relief. (TRA Docket No. 03-00211, Citizens d/b/a Frontier , no order issued to date). Combining Frontier’s pursuit of the most profitable

and largest customers with the fact that it can now price its services below the statutory price floor, could mean predatory pricing by Frontier to the detriment of Ben Lomand's residential customers. In such circumstances, Ben Lomand could not match Frontier's prices, thus forcing it to reduce its services and products which will, in turn, hurt the customer. Ben Lomand could even be forced out of business in such a scenario.

Consumers will also be hurt by the fact that in order for Frontier to price services below the statutory price floor, it will have to cut its services somewhere - either in quality, amount, service, etc.

C. The precedents cited by Frontier are not applicable in this matter.

1. Tennessee Attorney General Opinion No. 90-83 does not pertain to this matter.

The Tennessee Attorney General Opinion cited by Frontier does not pertain to the factual situation in this matter and is thus distinguishable. The Tennessee Attorney General opined that the statute prevented a rural telephone cooperative from establishing telephone service in an area that was already receiving adequate telephone service from another telecommunications service provider. The Attorney General also opined that the TRA is to decide whether or not "reasonably adequate telephone service is available," not the municipality desiring to issue a franchise to the cooperative. It is interesting that the Opinion stands for the proposition that the statute prohibits a rural telephone cooperative from offering service in an area where there already is "reasonably adequate telephone service." Therefore, the statute has not been interpreted to mean it solely prohibits competition in the territory of cooperatives. Such

dual interpretation means that this is a statute that does not fit the preemptive requirements of Section 253 of the 1996 Act.

2. Frontier also cites a case it refers as to the “Hyperion Preemption Order.”<sup>2</sup>

The statute and factual situation are different from the Hyperion Preemption Order and the case *sub judice*. In the Hyperion Preemption Order, the statute in question was T.C.A. § 65-4-201(d) which was supposed to protect the territory of ILECs with fewer than 100,000 lines. That statute did not provide for a challenge by a potential competitor to prove that there is no “reasonably adequate telephone service.” Also, Hyperion had exhausted its state remedies in that it had received a final order from the TRA based on the statute. In the case *sub judice*, the statute that Frontier is challenging was not the basis of the TRA’s denial of Frontier’s declaratory judgment petition. The other cases cited by Frontier are also distinguishable. *Silverstar Telephone Company, Inc. Petition for Preemption, Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd. 15639 (1997) preempted Wyoming Statute Annotated § 37-15-201(c) that allowed the Wyoming Commission to honor a qualifying LEC’s veto in a potential competitor’s application. In the statute at question here, no incumbent LEC, rural cooperative, or any telecommunications service provider has a veto power. In *The Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd. 3460 (1997), the statute at issue was one that, like the Tennessee statute in the Hyperion

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<sup>2</sup> *In the Matter of AVR, LP d/b/a Hyperion of Tennessee, LP Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion’s Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd. 11064 (1999), Pet. for reh’g den. 16 FCC Rcd 1247 (2001).

Preemption Order case, was a flat prohibition based on number of lines. Here, it is not the number of lines at issue and there is a provision available to any potential competitor to challenge the rural telephone cooperative's service as "reasonably adequate."

### III. Conclusion

Frontier's Petition should be denied because the TRA did not deny its declaratory ruling petition based on T.C.A. § 65-29-102, the statute which Frontier asks the FCC to preempt. Without such statute being the basis of denial, the FCC has no authority under Section 253 of the 1996 Act to preempt such statute.

Furthermore, Section 253(b) of the 1996 Act makes clear that the preemption provisions do not apply in every instance. As has been shown *supra*, such statute is necessary to protect the public safety and welfare, continue quality of telecommunications services, and necessary to safeguard the rights of consumers, and does all of these in a competitively-neutral and non-discriminatory manner.

For the foregoing reasons, Ben Lomand urges the FCC to deny the Petition of Frontier.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "H. LaDon Baltimore", written over a horizontal line.

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### Certificate of Service

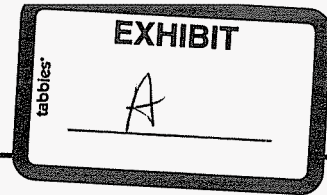
I hereby certify that on this the 21<sup>st</sup> day of February, 2006, a true and correct copy of the foregoing Comments of Ben Lomand Rural Telephone Cooperative, Inc. was served via U. S. Mail or electronic mail upon the following:

Marlene H. Dortch, Secretary **(via ECFS)**  
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H. LaDon Baltimore



BEFORE THE TENNESSEE REGULATORY AUTHORITY

**CERTIFIED  
COPY**

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TRANSCRIPT OF EXCERPT OF AUTHORITY CONFERENCE

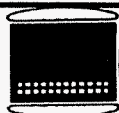
Monday, November 7, 2005

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APPEARANCES:

For Chattanooga Gas Company:	Mr. L. Craig Dowdy
For NuVox:	Mr. John J. Heitman
(by telephone)	Ms. Susan Berlin
For Sprint Nextel:	Mr. Daniel M. Waggoner
(by telephone)	
For Sprint Nextel:	Mr. Edward Phillips
For TRA Staff:	Mr. Richard Collier
	Ms. Sharla Dillon

Reported By:  
Jennifer B. Carollo, RPR, CCR



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1 (The aforementioned Authority  
2 conference came on to be heard on Monday, November 7,  
3 2005, beginning at approximately 1 p.m., before  
4 Chairman Ron Jones, Director Sara Kyle, Director  
5 Deborah Taylor Tate, and Director Pat Miller. The  
6 following is an excerpt of the proceedings that were  
7 had, to-wit:)

8  
9 MS. DILLON: Next we have Section 2,  
10 Directors Miller, Kyle, and Tate.

11 Docket No. 04-00379, Frontier  
12 Communications, Inc. Petition of Frontier  
13 Communications, Inc., for a declaratory ruling.  
14 Consider motion to dismiss.

15 DIRECTOR KYLE: On October 26, 2004,  
16 the petition of Frontier Communications, Inc., for a  
17 declaratory ruling was filed with the Authority.  
18 Frontier asked the Authority to declare that it has the  
19 authorization to compete in the territory of Ben Lomand  
20 Rural Telephone Cooperative, Inc.

21 On December 8, 2004, Ben Lomand filed  
22 the answer and motion to dismiss of Ben Lomand Rural  
23 Telephone Cooperative, Inc.

24 During the December 13, 2004,  
25 Authority conference, the panel voted unanimously to

1 convene a contested case proceeding in this matter to  
2 determine the issues set forth in the petition.

3 I have a motion that I would be glad  
4 to hear from my colleagues if you have something to say  
5 on this issue. If not I recommend -- I would move to  
6 grant the motion to dismiss as filed by Ben Lomand with  
7 respect to the petition for declaratory ruling  
8 submitted by Frontier Communications, Inc. I find that  
9 Frontier, then known as Citizens Communication, when  
10 requesting authority to provide competing telephone  
11 service was not granted statewide approval to provide a  
12 competing service. The 1996 order did not extend  
13 Citizens authority statewide to enter into territories  
14 of small telephone carriers or cooperatives, and it was  
15 clearly not my intent nor was it supported in the  
16 record.

17 I believe it is appropriate to  
18 dismiss the petition of Frontier at this time as it  
19 simply asks for relief that cannot be granted given its  
20 current certificate of convenience and necessity. And  
21 I so move.

22 (Pause.)

23 DIRECTOR MILLER: I'll second your  
24 motion and vote aye. First of all, from an equity  
25 standpoint, I believe that Frontier has a reasonable

1 argument. However, after reviewing the pleadings and  
2 applicable statutory provisions, I do not find specific  
3 language contained within existing state law that would  
4 permit the TRA to grant authority to CLECs to serve  
5 territories served by telephone cooperatives.

6 I am also convinced that prior to the  
7 1995 act this agency did not have authority to allow  
8 competitive entry into areas served by cooperatives.  
9 Furthermore, nothing in the 1995 state act explicitly  
10 changed or otherwise granted jurisdiction of this  
11 agency over telephone cooperative service areas.

12 So I think with respect to state law,  
13 the legislature is where I would have to point for  
14 Citizens to seek relief. Accordingly, I move that -- I  
15 agree with Director Kyle and would state for the record  
16 that this complaint might be more appropriately handled  
17 at the FCC.

18 DIRECTOR TATE: I will agree in the  
19 outcome. However, I would also like to point out that  
20 at least two other companies have come before us to  
21 expand their CCNs to enable it to extend service into  
22 previously restricted areas. So I'm not in any way  
23 prejudging that issue and whether or not it might come  
24 before us in the future and that -- that there are  
25 other appropriate procedural avenues other than the

1 ones that are before us today. As Director Miller  
2 noted the FCC, in addition, to a company's requests to  
3 expand its CCN instead of a declaratory ruling.

4 So I think with that said, I will be  
5 in agreement with the conclusion of your motion.

6 DIRECTOR KYLE: Thank you.

7 (Excerpt of Proceedings  
8 concluded.)  
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1

REPORTER'S CERTIFICATE

2

STATE OF TENNESSEE )

3

COUNTY OF WILLIAMSON )

4

I, Jennifer B. Carollo, Registered

5

Professional Reporter, Certified Court Reporter, and

6

Notary Public for the State of Tennessee, hereby

7

certify that I reported the foregoing proceedings at

8

the time and place set forth in the caption thereof;

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that the proceedings were stenographically reported by

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me; and that the foregoing proceedings constitute a

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true and correct transcript of said proceedings to the

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best of my ability.

13

I FURTHER CERTIFY that I am not related to

14

any of the parties named herein, nor their counsel, and

15

have no interest, financial or otherwise, in the

16

outcome or events of this action.

17

IN WITNESS WHEREOF, I have hereunto affixed

18

my official signature and seal of office this 7th day

19

of December, 2005.

20



21

*Jennifer B. Carollo*

JENNIFER B. CAROLLO,

REGISTERED PROFESSIONAL

REPORTER, CERTIFIED COURT

REPORTER, AND NOTARY PUBLIC

FOR THE STATE OF TENNESSEE

24

My Commission Expires:

25

June 1, 2008